92-1732

NO. _____

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Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES MAYLE,

Petitioner

versus

CALIFORNIA STATE LOTTERY COMMISSION; LEW RITTER, in his individual capacity

Respondent

PETITION FOR WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether after Rankin v. McPhearson 43 US 378, 388 and Roth v. Veterans Admin. of Gov. of U.S. 856 F.2d 1401, 1407 (9th Cir. 1988), existing law requires, in a public employee First Amendment Case, that, before the Court can find that "the government's interest as an employer in a smoothly-running office" outweighs an employee's first amendment right, the employer must demonstrate actual, material and substantial disruption"? 1/

2. Whether, in a summary judgment motion in a public employee's free speech case, the court may consider the factual issue of "whether or not the constitutionally protected speech was a substantial or motivating factor in the CSL'S actions" as part of the legal question whether

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1. See Rankin v. McPhearson, supra., 438 US at 384-388; Gillette v. Delmore 886 F.2d 1194 (9th Cir. 1989); A.P.W.U v. US Postal Service 830 F.2d 294, 303 fn. 12 (DC Cir. 1987); and Firefighters Aff'n DC v. Barry 742 F.Supp. 1182, 1191 (DDC 1990) for the requirement of "concrete harm" as a mandatory element in this required balancing.

speech is constitutionally protected?

3. If MAYLE'S remarks were not outside of First Amendment protection, did undisputed evidence show that he would have been treated in the same manner on the basis of his non-speech conduct anyway?[2/]

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2. This identical question was presented in Allen v. Scribner 812 Fed.2d 426, 429, 435 (9th Cir. 1987) wherein the court held that, "Whether Allen would have been transferred notwithstanding his First Amendment expression is 'a genuine issue of material fact,'...and is therefore, inappropriate for summary judgment." (emphasis added)

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STATEMENT OF JURISDICTION

Date of the entry of judgment sought to be reviewed: January 27, 1993.

Denial of Appellant's Petition for Review for the Supreme Court for the State of California

This Court has jurisdiction to review the judgment in question by Writ of Certiorari by virtute of 1257(a) and rules of the US Supreme Court, Rule 10.

PERTINENT STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Constitution, First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or breaching the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the government for redress of grievances.

U.S. Constitution, Art. Fourteen, Sec. 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE

1. Factual Background

CALIFORNIA STATE LOTTERY COMMISSION ("CSL") conducted a "sting" operation that resulted in criminal prosecution of Lottery ticket forgers. At that time, MAYLE was employed as an investigator in the Sacramento office of CSL'S security division. As part of that "sting" MAYLE was ordered to produce evidentiary documents to the court. In accomplishing that task, on or about November 5, 1986, MAYLE observed that co-employee Nelson was falsifying her activity logs that were to be produced to the court in response to discovery requests by the attorneys

for the alleged lottery ticket forgers. MAYLE believed that he perceived possible improper conduct and/or criminal activity involving documents that were to be submitted to the Sacramento Municipal Court and Sacramento District Attorney's office.

MAYLE did not report Nelson's possible misconduct to his superior, Lou Blanos, via the "chain of command" assertively because MAYLE believed Blanos was aware of and had approved Nelson's illegal actions. He did not report it to his immediate chain of command because they were implicated in the criminal activity. During December 1986 and January 1987 the District Attorney conducted an investigation of CSL concerning the alleged falsification/alteration of police documents (co-worker Nelson's daily activity reports). The investigation revealed "irregularities" in Nelson's reports.

After close of the District Attorney's investigation in January 22, 1987, CSL conducted

a lengthy, redundant investigation of the same matters. This investigation was conducted by Boese, the same supervisor to whom MAYLE had reported the possible criminal activity concerning the falsified records. During the course of the CSL investigation, MAYLE asserted that he had reported Nelson's perceived misconduct to Boese. Boese, of course, denied ever having received any such information. While this lengthy CSL investigation was still in progress, MAYLE was passed over for two vacant supervisorial positions although he had applied for those positions.

CSL asserts that Boese, the individual who investigated MAYLE and found that he did not report the perceived possible criminal activity concerning Nelson to her, was selected on a" hardship transfer" for one of the promotional opportunities.

The second promotional opportunity was filled by CSL with Anthony Baldassano, assertively because he was better qualified than MAYLE.

When asked whether MAYLE'S failure to properly report perceived misconduct (i.e. MAYLE'S report to BOESE and not to his "chain of command") was a factor in the decision not to promote MAYLE, Ritter (MAYLE'S supervisor) said: "Certainly it was not the sole or even nearly the primary reason, but it was a reason that I thought he had used extremely poor judgment in that case."

Ritter indicated in his deposition that the CSL investigation revealed that MAYLE "failed to properly report his perceptions of either misconduct or criminal activity." As a result, Ritter discussed the matter with MAYLE, then placed a copy of a "documented counselling letter" (attached as Exhibit "A" to the Appellate Court's decision) and placed it in his personnel file on June 15, 1987. The letter accuses MAYLE of "failing to properly report to management what you perceived to be possible improper conduct and/or criminal activity involving documents submitted to the Sacramento Municipal court and Sacramento District

Attorney's office"; this because MAYLE did report it, but to the wrong person according to the CSL. The letter then "instructs" MAYLE that in the future prospective misconduct should be immediately reported to MAYLE'S "supervisor or the proper security division management", i.e. his chain of command. This document was to remain in MAYLE'S personnel file for three months and would then be removed if there were no further incidents. Taking this "documented counselling" letter as a last straw reprimand, MAYLE resigned from his employment due to intolerable conditions.

In June 1988, MAYLE filed this action against CSL and against Ritter in his individual capacity.

CSL moved for a "summary judgment, non-suit and judgment on the pleadings.," and MAYLE moved concurrently for summary adjudication of issues. The cross-motions were heard simultaneously. The trial court granted CSL'S motion for summary judgment, made no ruling on CSL'S alternative

motions, and denied MAYLE's motion as moot. MAYLE appealed from the judgment in favor of CSL. The Court of Appeals for the State of California, Third Appellate District, issued its decision on November 9, 1992, affirming the trial court's granting of the motion for summary judgment.

On December 21, 1992, Plaintiff filed his Petition for Review in the Supreme Court of the State of California; said Petition for Review being denied on January 27, 1993.

The issue of Plaintiff's right of free speech guaranteed by the First Amendment of the United States Constitution was raised at every step of the proceedings in the California courts. The issue was first raised in the compliant, and ruled on by the Superior Court of California, Sacramento County, when it granted Defendants' (Respondents) Motion for Summary Judgment (see Appendix, Transcript of Proceedings, Thursday, December 20, 1990, p. 1:1-28 through 20:1-3; 39:19-28 through 41:1-12).

The First Amendment issue was again raised at the Appellant Court and a decision (see Appendix, decision of the Court of Appeal of the State of California, Third Appellate District p. 11:16-28 through 28:1-6).

Lastly, the Supreme Court of the State of California, without comment, denied Appellant's Petition for Review (see Appendix, decision of the Supreme Court of the State of California wherein Appellant's Petition for Review was denied).

DEFENDANTS' ARGUMENT

ISSUE NO. 1

In Rankin v. McPhearson, this court dictated that the Pickering balancing of MAYLE'S making his report to Boese against "the interest of the State, as an employer, promoting the efficiency of the public service it performs through its employees." (See Pickering v. Board of Education 391 U.S. 563, 568 (1967)) is a mandatory requirement to determine whether a public employee's speech is protected. With good

reason, the State bears the burden of justifying its actions under the Pickering calculus: a means to allow a public employer to demonstrate, by a preponderance of evidence, that sacred, First Amendment speech can only be "chilled" for the public good by showing "concrete harm" to the efficiency of its operation. (Connick v. Myers 461 U.S. 138, 150 (1982)).[3/]

The initial issue is one of law; whether the MAYLE's speech was Constitutionally protected Knapp v. Whitaker 757 F.2d 827, 845 (7th Circuit, 1985) citing inter alia Connick v. Myers 61 U.S. 138 (1983); Mt. Healthy City Board of Ed. v. Doyle 429 U.S. 274 (1977); Pickering v. Board of Education, supra 391 U.S. 563 (1968). The Supreme Court of the State of California, in this case, affirmed that "the balancing of interest in this case weighed in

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3. The Appellate court determined that the threshold question of whether MAYLE'S speech may be "fairly characterized as constituting speech in a matter of public concern" was met (See Connick v. Myers, supra 461 U.S. 146.

favor of CSL as to the documented counselling letter (Appellate Court decision p. 15), because the "concrete harm" requirement of Rankin v. McPhearson 483 U.S. 378 (1987) and Chico Police Officer's Assn. v. City of Chico (1991) 232 Cal.App.3d 635, 650 is unnecessary.

As a predicate for this conclusion, the Appellate Court (which was later affirmed by the Court of last resort in the State of California) stated:

> We believe that the question of whether speech is Constitutionally protected encompasses consideration of whether there has been an infringement of First Amendment Rights at all, either through restraint of future speech or retaliation/punishment for past speech that has a chilling effect on the exercise of First Amendment rights.

The Appellate Court (affirmed by the Court of last resort in the State of California) concluded that the "concrete harm" requirement set forth in Chico Police Officers' Assn. v. City of Chico, supra., 232 Cal.App.3d at 650, a decision assertedly founded in Federal law (i.e. Rankin v. MacPhearson, supra., 43 US 378; Roth

v. Veteran's Admin. of Gov. of US, supra., 856 F.2d 1401; Gillette v. Delmore, supra., 886 F.2d 1194; Firefighters Ass'n DC v. Barry 742 F.Supp. 1182; and A.P.W.U. v. US Postal Service 830 F.2d. 294 still existed, but was inapplicable to this action because:

> We conclude the absence of actual disruption need not be shown in the context of this case, where the question is whether the First Amendment prevents a state employee from instructing an employee on an office procedure that does not inhibit free speech." (See Appendix, Court of Appeal decision p. 20)[4/]

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4. Since this [the Rankin] decision, the Ninth Circuit has determined that, before we can find that, "the government's interest as an employer in a smoothly-running office" out weighs [MAYLE'S] First Amendment right, the [CSL] must demonstrate actual, material and substantial disruption." (Roth, supra at p. 1407; see also Gillette v. Delmore 9th Circuit (1989) 886 Fed.2d 1194 [finding genuine issues of material fact as to whether employees' speech impaired efficient and save operation fire department]; A.P.W.U., supra 830 Fed.2d 294, p. 303, fn. 12 [employee's interest prevails in absence of evidence of concrete harm]; Fire-fighters, supra 742 Fed.Supp. at p. 1191 [harm cannot be "merely hypothetical;" testimony that unidentified fire fighters "grumbled" about the message conveyed by the bumper sticker held insufficient to show concrete harm to departmental interest]. Id. at 650. (See also (continued...)

The California Supreme Court's incorrect decision essentially eviscerated a California State public employee's right to speak on matters of public concern as it gives the public employer the ability to carapace its retaliatory actions under the shell of "instructions" to the employee it wishes to quiet or retaliate against. It allows a Court, contrary to existing federal law (See Rankin, supra.) to avoid the necessity of engaging in the Pickering calculus simply by determining that factually the acts of the employer were not a violation of the employee's speech on a matter of public concern.

ISSUE NO. 2

In a summary judgment motion in a public employee's free speech case, the court may not consider the factual issue of "whether or not

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4. (...continued)
fn. 10 in the Chico Police Officer's Assn. v. City of Chico 232 Cal.App.3d at 650, which indicates that the "concrete harm" requirement is still in full force in effect in this appellate district.

the constitutionally protected speech was a substantial or motivating factor in the CSL'S actions" as part and parcel of the initial legal question "whether speech is constitutionally protected."

In actuality, the Appellate Court (affirmed by the Court of last resort in the State of California) contrary to existing Federal law has co-mingled the legal question of whether or not MAYLE'S speech to Boese was protected with the "factual" question of whether or not the Constitutionally protected speech was a substantial or motivating factor in the Defendants' action (Mt. Healthy City School District v. Doyle, supra 429 U.S. at 285-287; Knapp v. Whitaker, supra 757 F.2d at 845.

Even the Egger decision (Egger v. Phillips 710 F.2d. 292 (7th Cir. 1983)), so heavily relied upon by the California Supreme and Appellate Courts, admonishes against summary judgment in First Amendment cases, citing as one reason, that these type of cases are often inappropriate

for resolution via summary judgment as the basic question that must be answered "...is a question of intent of a governmental actor" Egger v. Phillips, supra 710 F.2d at 320. In this case, this amounts to a question of motivation concerning both the rationale (intent) behind the June 15, 1987, "documented counseling" letter (and the failure to promote which will be discussed infra).

The Knapp court, in a factually indistinguishable situation found that a similar documented counseling given to Knapp on April 2, 1981, was Constitutionally impermissible (Knapp v. Whitaker, supra 757 F.2d, 833-834, 846.[5/] (If the public

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5. In the Knapp case, the documented counseling stated, "I asked for the conference with Terry to point out to him that he is in violation of board policy 2111.10 which deals with the communications being made to Board members without first sending those communications [sic] to the superintendent of schools. This has been taking place for some time and I have not been concerned. However, I believe now it has become somewhat of a problem. I asked Terry at the conference to stay within (continued...)

employee's speech is protected, then it is constitutionally impermissible to restrict protected comments to a "chain of command" limitation.) Succinctly put, here there was admissible evidence that there was an investigation of MAYLE because he improperly reported (to Boese; the only report he made) possible criminal activity; that this investigation found that MAYLE indeed failed to properly report to management possible criminal activity; that he was given a documented counselling because of the investigation; and that he was under investigation was "a reason" he was not selected for promotion.

ISSUE NO. 3

MAYLE'S remarks were not outside of First

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5. (...continued)
Board policy. I don't believe that he was aware that he was in violation of Board policy and I believe he will not deliberately violate the policy in the future. He has been asked to remediate this aspect of his conduct."; a letter almost identical in content to the instant June 15, 1987, letter that the lower courts found constitutionally permissible.

Amendment protection, and undisputed evidence did not show that he would have been treated in the same manner on the basis of his non-speech conduct anyway[6/]; hence, summary judgment is not appropriate.

In Allen v. Scribner 812 F.2d 426, 435 (9th Circuit, 1987) the court held that, "Whether Allen would have been transferred notwithstanding his First Amendment expression is 'a genuine issue of material fact,'...and is therefore, inappropriate for summary judgment."

Here, the CSL did not present any evidence that it would have made the same decision concerning MAYLE'S promotions, ; rather, the CSL merely presented evidence that the person selected instead of MAYLE was more qualified, had more supervisory experience and performed better in the interview. Granted these were all valid reasons why MAYLE could not have been

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6. The identical question presented in Allen v. Scribner 812 Fed.2d 426, 429, 435 (9th Circuit, 1987).

selected, but they do not rise to the level of demonstrating, as a matter of law, that the CSL would have made the decisions it did concerning MAYLE notwithstanding his First Amendment expression.

The quoted support in the Appellate decision (affirmed by the Court of last resort, the Supreme Court of the State of California) for the premise that CSL would have made the same decision, in fact, supports the second step of the Mt. Healthy analysis, i.e. that MAYLE'S expression of free speech was a substantial or motivating factor in the Defendants' actions. (See Allen v. Scribner, supra 812 F.2d 435).

The fact that another employee was more qualified, had more supervisorial experience and performed better in the interview is definitive only to establish that MAYLE could not have been selected for promotion rather than he would not have been selected for promotion notwithstanding

his exercise of free speech.[7]

CONCLUSION

MAYLE had worked for the LOTTERY for several years without incident. He chose, because of events within preceding days of his observation of the possible criminal activity, upon the advice of his attorney, to report the possible criminal activity to what he thought at the time was a non-tainted supervisor; rather than to his tainted his chain of command because his chain

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7. As a footnote, see fn. 9 of the Decision of the Third Appellate District of the State of California, the Court of Appeal summarily dismissed MAYLE'S statement, "I was subjected to extreme emotional distress, a denigration of my reputation, isolation, reduction in duties, and loss of promotion because I have come forward." This from MAYLE'S statement in support of his motion for summary judgment; equating these actions by the Defendant CSL: to the ostracism suffered by Egger in Egger v. Phillips 710 F.2d 292, 322-323 (7th Cir. 1983) [ostracism by fellow employees is a price of the existence of free speech that cannot be passed on to the employer]. Of course, the ostracism that the Egger court discussed was the ostracism of fellow workers, not of retaliatory acts by the supervisors, as we have in this case. The distinction is clear: MAYLE'S "ostracism" was retaliatory ostracism by the Defendants, not, as it was in Egger of fellow employees.

of command "had ordered the alterations and it appeared to me that a report to him would have been futile."

The other individuals who also observed the falsification of the evidence did not break the "code of silence". They simply did not report anything. Conscientiously, MAYLE reported the possible criminal activity by the most forthright, objective means available that he opined would insure some action was taken upon it; rather than reporting it to his tainted chain of command.

MAYLE was the only one to receive a documented counselling letter for, of all things, "improperly reporting" the perceived criminal activity. After being subjected (an only he was subjected) to a lengthy, redundant CSL investigation after he was found innocent by an objective outside investigation by the Sacramento District Attorney's Office, he was not selected for appointments for a variety of specious reasons (one of which was that he was

under "investigation" for improperly reporting possible criminal activity; the falsified Nelson activity reports).

The definite message to the numerous law enforcement officers that have watched this case progress through the courts is that the "code of silence" is intact, impenetrable and incapable of being broken.

The message is clear to peace officers. The individuals in the CSL who remained unscathed were those individuals who observed the possible criminal activity, <u>yet reported nothing</u>.

APPENDIX

1. Decision of the Supreme Court of the State of California denying Appellant's Petition for Review (Jan. 27, 1993)

2. Decision of the Third District Court of Appeal, State of California, affirming the trial court's judgment (Nov. 9, 1992)

3. Superior Court of the State of California, County of Sacramento, Judgment (Jan. 10, 1991)

4. Superior Court of the State of California, County of Sacramento, Order Granting Summary Judgment (Jan. 10, 1991)

5. Transcript of Proceeding on Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment, Non-Suit, and Judgment on the Pleadings (Dec. 20, 1990)

Third Appellate District No. C010689
S030357

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JAMES MAYLE, Appellant

v .

CALIFORNIA STATE LOTTERY COMMISSION
Et Al., Respondent
Appellant's petition for review DENIED.

MOSK
Acting

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

JAMES MAYLE,)
C010689
Plaintiff and Appellant,)
(Super.Ct.No. 502775)

v.

CALIFORNIA STATE LOTTERY COMMISSION et al.,

Defendants and Respondents.

Plaintiff James Mayle appeals from summary judgment entered in favor of defendants, California State Lottery Commission and its Security Chief Lew Ritter (collectively CSL), in plaintiff's action asserting violation of his free speech rights (U.S. Const., 1st Amend.; Cal. Const., art. I, § 2) while employed by CSL. Plaintiff contends triable issues of material fact exist as to whether CSL retaliated against him in

violation of his constitutional right to freedom of speech. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1986, CSL conducted a "sting" operation that resulted in criminal prosecution of lottery ticket forgers. At

the time, plaintiff was employed as an investigator in CSL's Security Division. In October 1986, a newspaper article reported statements, apparently made by Judge Lytle, suggesting that plaintiff was possibly involved in withholding evidence. Plaintiff describes himself as having felt threatened and isolated because Ritter knew plaintiff was innocent yet refused to support him.

Plaintiff was ordered to produce documents to the court. In accomplishing that task, on or about November 5, 1986, plaintiff observed that coemployee Pam Nelson was preparing her activity logs in duplicate, with apparent discrepancies. According to the pleading, plaintiff believed the activity logs were documents that

would be submitted to the court and defense counsel, and the perceived "doctoring" of the logs possibly constituted breach of duty and public trust, violation of discovery statutes, and violation of the California Constitution, article XIV (labor relations) and article XX, section 3 (sworn oath of office). According to his declaration in support of his own motion for summary adjudication (which was heard simultaneously with CSL's motion), plaintiff believed Nelson's conduct was possible criminal activity in violation of Penal Code sections 134 (falsifying documents to be used in evidence) and 135 (destroying or concealing documentary evidence).

Plaintiff did not report Nelson's possible misconduct to his immediate superior, Lou Blanas, assertedly

because

plaintiff believed Blanas was aware of and had approved Nelson's actions. Plaintiff did **not report his observations** to others in the appropriate chain of **command (Security Chief** Ritter or Ritter's associate Ricky Blim), assertedly because he was afraid.1/ Upon advice of his attorney plaintiff reported Nelson's possible criminal activity to "an independent third party supervisor," Mary Ann Boese, the Supervising Agent for

1/ It is not clear what plaintiff assertedly feared. In his declaration opposing CSL's summary judgment, plaintiff indicated there was no standard reporting practice for the Security Division and he was not told what the proper reporting procedures were supposed to be "if my immediate

supervisor was implicated in the wrongdoing or if I suspected that others higher up in the chain of command either were involved in the wrongdoing or would cover it up." Notably, plaintiff does not aver that he actually suspected Ritter or Blim of wrongdoing or of complicity in Nelson's misconduct. In his declaration in support of his own motion for summary adjudication, plaintiff said he did not report to Ritter or Blim "because of the events of a few days earlier which resulted in the October 31, 1986, derogatory article in the Sacramento Bee concerning my withholding of evidence. I was afraid that the same would occur here."

Thus, plaintiff's position is that he did not report to Ritter or Blim because he thought it would be futile

or he was afraid he would somehow be accused of wrongdoing. Although evidence in opposition to a summary judgment motion is to be liberally construed, we do not construe plaintiff's position to be that he believed Ritter or Blim were involved in any wrongdoing, because--despite plaintiff's insinuations of complicity in his argument--he avoids reliance on any such inference. Thus, in replying to CSL's assertion on appeal that plaintiff did not believe Ritter or Blim were implicated, plaintiff retorts only that the "actual facts" are that the cited record "is devoid of any evidence of whether or not Plaintiff believed or did not believe that Ritter and/or Blim were involved in the wrongdoing." We therefore do not consider plaintiff's position to be

that he believed Ritter and Blim were implicated.

CSL's San Jose office, during a two-day training meeting for all agents on November 7th or 8th, 1986. It is undisputed that Boese was not plaintiff's supervisor nor was she in the chain of command over plaintiff at that time. **Plaintiff's** stated purpose in making the report was: "I was concerned that the falsification of evidence should be brought to the proper authorities because it was clear that it was a violation of public trust and of interest to the community at large."

During December 1986 and January 1987, based on an anonymous report, the district attorney conducted an investigation of CSL concerning possible alleged perjury by plaintiff in Judge Lytle's court and alleged falsification/alteration of police documents (Nelson's daily activity

reports). The investigation revealed nothing to substantiate an act of perjury by plaintiff. The investigation did reveal irregularities in Nelson's reports, which were supposed to be contemporaneously prepared but which Nelson apparently attempted to later reconstruct. However, the reports were for internal use only. It was conceivable an agent might use a daily activity report to refresh recollection for court testimony, but Nelson had not done so. Nothing indicated that Nelson did anything but submit a set of daily activity reports which she believed to be correct.

2/Whether plaintiff reported his concern to Boese is disputed. We will assume for the sake of argument that

he did.

After close of the district attorney's investigation on January 22, 1987, CSL conducted its own investigation of the same matters as well as an investigation (apparently at Nelson's request) of plaintiff's alleged misconduct in going through Nelson's desk drawers in order to obtain her activity logs. The investigation was conducted by Boese and Blim. During the course of CSL's investigation, plaintiff claimed that he had reported Nelson's perceived misconduct to Boese. Boese had no recollection of having received any such information. Ritter testified he was unaware of plaintiff's supposed report to Boese until plaintiff made this statement during the CSL investigation.

While CSL's investigation was still in progress, in February 1987, CSL

chose Boese to fill a vacant supervisorial position in Sacramento. Though plaintiff had applied to be promoted to that position, CSL said it selected Boese because she had previously requested a hardship transfer from San Jose to Sacramento in order to care for her ailing mother.

Plaintiff also applied in May 1987 to be promoted to the San Jose post vacated by Boese. But CSL instead chose Anthony Baldassano, assertedly because he was the most qualified. When asked whether plaintiff's failure to properly report perceived misconduct was a factor in the decision not to promote plaintiff, Ritter said: "Certainly it was not the sole or even nearly the primary reason, but it was a reason that I thought he had used extremely poor

judgment in that case."

Ritter indicated in his deposition that **the CSL** investigation revealed that plaintiff "failed to properly report his perceptions of either misconduct or criminal activity at the time that he became aware of those perceptions." As a result, Ritter discussed the matter with plaintiff, then placed a copy of a "documented counselling letter" (attached as Appendix A) in plaintiff's personnel file on June 15, 1987.3/ The letter says nothing about the report to Boese but only that plaintiff "failed to properly report to management . . . ." (Appen. A.) The letter "instructs" plaintiff that in the future suspected misconduct should be immediately reported to plaintiff's supervisor or the proper Security Division management. (Appen. A.) By its own

terms the document was to remain in plaintiff's personnel file for three months and would then be removed if there were no further incidents.

Plaintiff viewed the documented counseling letter as a reprimand and resigned from his employment due to "intolerable" conditions.

In June 1988, plaintiff filed this action against CSL and against Ritter in his individual capacity. The amended complaint alleged the following causes of action: (1)

3/Although plaintiff claims on appeal that there is no evidence that Ritter discussed the matter with him, plaintiff's own declaration opposing summary judgment refers to such a discussion.

violation of civil rights (U.S. Const., 1st Amend.; Cal. Const., art. I, § 9), (2) intentional infliction of emotional distress, (3) unlawful retaliation for disclosing violations of law (Labor Code, § 1102.5), (4) violation of rights of freedom of speech, (5) wrongful discharge in violation of public policy for plaintiff's disclosure of CSL's unlawful policy of duplicative record keeping, and (6) denial of due process and equal protection (42 U.S.C. § 1983).4/

CSL moved for "summary judgment, non-suit and judgment on the pleadings," and plaintiff moved for summary adjudication of issues. The cross-motions were heard simultaneously. The trial court granted CSL's motion for summary judgment, made no ruling on CSL's

alternative motions, and denied plaintiff's motion as moot. Plaintiff appeals from the ensuing judgment in favor of CSL.5/

DISCUSSION

A. Standard of Review

"A motion for summary judgment 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd.

4/Plaintiff later dismissed the 42 U.S.C. section 1983 cause of action against Ritter in his official capacity.

5/The only issues raised on appeal relate to the granting of CSL's motion. Plaintiff did not seek review

of the denial of his own motion.

(c) [hereafter section 437c].)" (Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.) The function of the trial court in ruling on a motion for summary judgment is merely to **determine whether triable issues of material fact exist, not to decide the merits of the issues themselves.** (Ibid.) "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.] To succeed, the defendant must conclusively negate a necessary element of the plaintiff's case, and demonstrate that under no hypothesis is there a material issue of fact that requires the process of a trial." (Ibid.) Our review is de novo. (Saldana v. Globe-Weis Systems Co. (1991) 233 Cal.App.3d 1505,

1511-1513.)

B. Preliminary Matter

Before proceeding to the merits, we first comment on various procedural issues.

1. Motion to Augment

First, we dispose of CSL's motion to augment the record on appeal with the entire deposition transcripts of four witnesses, excerpts of which were cited by CSL in its motion for summary judgment. CSL claims it submitted to the trial court its only copies of the complete deposition transcripts of those four witnesses, instead of following the standard practice of submitting attested copies of cited excerpts only.

The transcripts seem to have disappeared. CSL speculates the trial court must have sent them to plaintiff's attorney. Thus, CSL not only asks us to allow the deposition transcripts to be included in the record on appeal, but also asks us to order plaintiff to transmit his copies of the entire transcripts to this court.

Plaintiff opposes the motion on the grounds that (1) there is no evidence that the transcripts were ever filed with the trial court, (2) the motion is untimely under this court's local rules, and (3) it would be unfair to allow CSL to present new evidence on appeal. Although CSL claims the trial court's comments referencing deposition testimony reflect the presence of transcripts in the courtroom, plaintiff points out that

the record contains deposition excerpts submitted by plaintiff himself.

We have reviewed the record on appeal and have

-determined that the deposition pages cited by CSL in the trial court are contained in the record as part of the excerpts offered by plaintiff. We therefore deny CSL's motion to augment the record on appeal, because augmentation is unnecessary.6/

6/We reject plaintiff's argument, raised for the first time on appeal, that CSL's motion for summary judgment was fatally defective procedurally because CSL did not submit the cited evidence in the trial court.

2. Request for Judicial Notice

In its appellate brief, CSL **requested that we take** judicial notice of a personnel management and procedures manual. After filing its appellate brief, CSL filed a motion requesting that we take permissive judicial notice of (1) the same personnel management policy and procedures manual attached to the brief, and (2) a supervisor's handbook apparently prepared by the State Personnel Board. CSL claims these documents establish that a "documented counseling" letter, such as the letter placed in plaintiff's file, does not constitute "adverse action." As will appear, plaintiff contends the letter constitutes adverse personnel action infringing his freedom of speech.

Plaintiff opposes judicial notice as

an attempt by CSL to introduce new evidence on appeal. CSL offers no explanation whatsoever for its failure to submit this evidence to the trial court. The proffered justification for judicial notice is "because the appellant has persisted in contending without citation of authority or evidence that a 'documented counseling' is an adverse action or punitive action." However, CSL was well aware of plaintiff's position from the beginning, because it was alleged in plaintiff's pleading.

Moreover, the personnel management and procedures manual submitted by CSL is dated February 1988--after the events at issue in this case occurred. As to the handbook, CSL has failed to show its authenticity or applicability. Thus, we have no idea

whether its use was mandatory, or whether it was

used in plaintiff's department. The handbook itself indicates in the foreword that it is directory.

The motion for judicial notice is denied.

3. Appellate Brief Deficiencies

CSL ignores California Rules of Court, rule 15(a), which requires that "[t]he statement of any matter in the record shall be supported by appropriate reference to the record." (Undesignated rule references are to the California Rules of Court.) CSL's brief contains many references to pages of deposition transcript that were not cited in the trial court and which are not part of the record on appeal. Plaintiff catalogues these new cites in his reply brief. We disregard all factual assertions in the briefs that are unsupported by citation to evidence

cited to the trial court.7/

We now proceed to consider the merits of the appeal.

C. Free Speech

Plaintiff conceded at oral argument that his entire action turns on the viability of his claim that CSL retaliated against him for his exercise of free speech in telling Boese

7/We note plaintiff's statement of facts on appeal cites to his own trial brief, which is not "appropriate reference" because a trial brief is not evidence. However, we recognize that CSL relied on plaintiff 's trial brief to support its alternative motion for nonsuit, asking the trial court to consider the trial brief as plaintiff's opening statement. The scant

evidentiary presentation of CSL's summary judgment motion excuses plaintiff's need to resort to other sources in order to define a factual framework for discussion.

about Nelson's perceived misconduct.8/ According to plaintiff, the retaliation took the form of the denial of promotions and the documented counseling letter (Appen. A), which was assertedly the "final straw." Thus, plaintiff seeks damages for a constructive wrongful termination based on public policy, with "abridgement of free speech" constituting the public

policy theory. Plaintiff also contends CSL's violation of his freedom of speech in itself gives rise to a damages remedy. We will conclude (1) the documented counseling letter does not constitute an infringement of the free exercise of speech, and (2) CSL established that the denial of promotions would have occurred even in the absence of

plaintiff's report to Boese. These conclusions are fatal to plaintiff's entire action.2/

1. The Documented Counseling Letter

We begin with the documented counseling letter. At oral argument in this court, plaintiff conceded his case hinges

8/As noted, we are assuming for the sake of argument that plaintiff reported his concern to Boese. We also note CSL implies on appeal that the speech at issue includes plaintiff's disclosure of Nelson's activity to the district attorney. However, the only protected speech claimed by plaintiff is his report to Boese.

9/ On appeal, plaintiff makes vague contentions that CSL also engaged in "covert" personnel actions that

effectively isolated, humiliated, and stripped him of his job duties and professional pride. However, he offers no specifics. We note the pleading alleged that plaintiff was "ostracized." However, ostracism in itself provides no basis for relief. (Egger v. Phillips (7th Cir. 1983) 710 F.2d 292, 322-323 ostracism is a price of the exercise of free speech that cannot be passed on to employer].)

on the letter, which assertedly triggered his resignation from his job.

The First Amendment's freedom of speech clause constrains public employers in their personnel decisions. (Egger v. Phillips (7th Cir. 1983) 710 F.2d 292, 312, citing Keyishian v. Board of Regents of New York (1967) 385 U.S. 589 [17 L.Ed.2d 629.) An employee's speech may be constitutionally protected even if spoken internally within the workplace rather than outside the agency. (Givhan v. Western Line Consolid. Sch. Dist. (1979) 439 U.S. 410, 415-416 [58 L.Ed.2d 619, 624-625].)

"[A] three-step analysis is required in a case involving the infringement of a public employee's First Amendment right to free speech.

[Citation.] The initial issue is one of law, whether the plaintiff's speech is constitutionally protected. [Citation.] If this burden is satisfied, the next question is one of fact, whether the constitutionally protected speech was a substantial or motivating factor in the defendant's actions. If this second burden is satisfied, the third question is also one of fact, whether the defendant defeated the plaintiff's claim by demonstrating that he would have reached the same decision in the absence of the plaintiff's constitutionally protected speech." (Knapp v. Whitaker (1985) 757 F.2d 827, 845, citing inter alia Connick v. Myers (1983) 461 U.S. 138 [75 L.Ed.2d 708], Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S.

274 [50 L.Ed.2d 471], Pickering v. Board of Education (1968) 391 U.S. 563 [20 L.Ed.2d 811].)

We begin with the first step of the analysis. As we recently explained, in determining whether a public employer has retaliated against an employee for exercising First Amendment rights, "the threshold question . . . **is whether the employee's challenged speech may be 'fairly characterized as** constituting speech on a matter of public concern . . . ." (Chico Police Officers' Assn. v. City of Chico (1991) 232 Cal.App.3d 635, 643, citing Rankin v. McPherson (1987) 483 U.S. 378, 384 [97 L.Ed.2d 315, 324] and Connick v. Myers, supra, 461 U.S. at p. 146 [75 L.Ed.2d at p. 719].) If it may, then the inquiry requires a balancing of the employee's interests

as a citizen against the government's interest as an employer in promoting the efficiency of the public services it performs through its employees. (Chico, supra, 232 Cal.App.3d at p. 643, citing inter alia Pickering v. Board of Education, supra, 391 U.S. at p. 568 [20 L.Ed.2d at p. 817].)

We believe that the question whether speech is constitutionally protected encompasses consideration of whether there has been an infringement of First Amendment rights at all, either through restraint of future speech or retaliation/punishment for past speech that has a chilling effect on the exercise of First Amendment rights.

"While public employees do not forfeit their protection against official abridgement of their freedom

of

speech by virtue of the employment relationship, and while adverse personnel decisions may constitute such an abridgement, . . . 'it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."' (Egger v. Phillips (7th Cir. 1983) 710 F.2d 292, 313, citing Pickering, supra, 391 U.S. at p. 568.)

Here, we will assume in plaintiff's favor that his report to Boese involved a matter of public concern, satisfying the threshold question of the first step of our analysis. "Once it is determined that the speech addresses a matter of public concern, the court must balance the employee's interest in making the statement against the public employer's interest in promoting efficiency. This balancing also presents **a legal** question." (Chico, supra, 232 Cal.App.3d at p. 648.) The balancing of interests in this case weighs in favor of CSL as to the documented counseling letter.

In Egger v. Phillips, supra, 710 F.2d 292, a defense summary judgment was affirmed in a damages action by an FBI agent against his former superiors based on allegations that

he

had been transferred and ultimately discharged in violation of his First Amendment rights after he reported a coemployee's perjury and acceptance of bribes. (Id. at p. 301.) The plaintiff was discharged not for the exercise of free speech but for failure to report to his new office when transferred. The transfer itself was shown by the defendants' evidence to have been necessitated by the plaintiff's loss of effectiveness in his former office, where mutual distrust prevailed. (Id. at p. 323.) The Egger opinion contains a detailed description of evidence of office disruption--rumors, threats, an anonymous shooting incident at the plaintiff's home, and mutual mistrust between the factions that developed as employees took sides in the escalating hostilities during the

plaintiff's ongoing investigation of the coworker's conduct. (Id. at pp. 300-311, 319-320.) The Seventh Circuit held that (1) the personnel actions did not abridge free speech rights, and (2) assuming an abridgement, the employer had established a qualified immunity defense. (Id. at pp. 315, 322-323.)

In applying the Pickering balancing test, the Egger court noted the public employer's interests as: "(1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty

and confidence.

"While these interests are ever present, their strength and applicability in any given employment situation depend on both the nature of the tasks performed by the particular employee and the mission of the agency for which he works. Harmony is particularly required among employees who frequently are required to work on joint projects and the importance of avoiding disharmony among such workers is particularly acute in certain types of endeavors.

". . . [T]he state interests enunciated above are particularly acute [in a law enforcement agency], both because of the need for teamwork among agents and the high stakes that are involved in law enforcement." (Egger, supra, 710 F.2d at p. 319-)

We believe the same principles

apply here. Thus, CSL as a public agency with a quasi-police force clearly has the right to see to it that complaints about official misconduct by other employees within the organization are channeled through supervisorial channels. This is particularly so where, as here, the essence of plaintiff's complaint involves wrongdoing by a coworker of equal rank rather than a superior in the chain of command.

Moreover, we find nothing in the letter suggesting abridgement of free exercise of speech. The letter informs plaintiff he failed to properly report and in the future was to report perceived wrongdoing to the appropriate Superior. The letter does not chastise plaintiff for speaking to Boese, nor

does it preclude or discourage plaintiff from speaking to anyone he chooses in addition to the appropriate superior.

Plaintiff claims the only way the government can win the balancing test is by proving that his speech caused "actual, material and substantial disruption" in the workplace. It is true we said in Chico, supra, 232 Cal.App.3d 635, that "before we can find that 'the government's interest as an employer in a smoothly-running office' outweighs [the employee's] First Amendment right, the [employer] 'must demonstrate actual material and substantial disruption"' in the workplace caused by the speech. (Id. at p. 650.)

However, Chico and cases cited therein dealt with claims where the

personnel action taken by the employer was unquestionably adverse action inhibiting free speech. Thus, the personnel action in Chico was that the police department (1) prohibited use of a bulletin board for an employee newsletter criticizing management and (2) disciplined the author based on the content of the newsletter by placing in his personnel file a written reprimand for insubordination due to his "disparaging remarks." (Id. 232 Cal.App.3d at p. 640; see also Rankin v. McPherson (1987) 483 U.S. 378 [97 L.Ed.2d 315] [discharge of employee for expressing hope that President would be assassinated]; Connick v. Myers, supra, 461 U.S. 138 [75 L.Ed.2d 708 [discharge of employee for distributing in workplace questionnaire soliciting criticism of

management]; Gillette v. Delmore (9th Cir. 1989) 886 F.2d 1194 [city

admitted firefighter's open criticism of officers' response to emergency call was substantial factor in termination of firefighter]; Roth v. Veteran's Admin. of Gov. of U.S. (9th Cir. 1988) 856 F.2d 1401 [demotion for "whistleblowing"]; A.P.W.U. v. U.S. Postal Service (D.C. Cir. 1987) 830 F.2d 294 discharge for inter alia writing newsletter prejudicial to Postal Service]; Fire Fighters Ass'n Dist. of Columbia v. Barry (D.D.C. 1990) 742 F.Supp. 1182 [firefighters disciplined for "offensive" bumperstickers and public comment on firefighter safety concerns].) Thus, cases requiring evidence of actual disruption do not deal with the issue presented by this case and do not compel an actual disruption requirement where the

balancing of interests goes to the question whether the personnel action is adverse action infringing freedom of speech.

Indeed, as we have noted, Chico said: "Once it has been determined that the speech addresses a matter of public concern, the burden is on the public employer to justify the discipline on legitimate grounds under the balancing test." (Id. 232 Cal.App.3d at p. 650, citing Rankin v. McPherson, supra, 483 U.S. 378 [97 L.Ed.2d 315].) Furthermore, the Pickering court itself, in establishing the balancing test, cautioned against a rigid application of the test. Thus, noting the "enormous variety of fact situations" in which public employees make statements critical of superiors, the

court said, "we do not deem it either appropriate or feasible

to attempt to lay down a general standard against which all such statements may be judged . . . [but] shall indicate some of the general lines along which an analysis of the controlling interests should run." (Pickering, supra, 391 U.S. at p. 569 [20 L.Ed.2d at pp. 817-818].)

We conclude the absence of actual disruption need not be shown in the context of this case, where the question is whether the First Amendment prevents a state employer from instructing an employee on an office procedure that does not inhibit free speech.

As in Egger, we believe that "[a]rriving at the Pickering balance in the context of this case turns not on whether the speech is protected at all, but rather, upon the scope of protection which it is afforded."

(Egger, supra, 710 F.2d at p. 322.) "Pickering identifies the factors which assist a court in determining whether the state employer is punishing an employee merely for expressing an opinion which the employer desires to suppress or instead is responding legitimately to the effects the speech has on the function of the agency." (Id. at p. 320.) "[T]he Pickering analysis can be viewed in part as a search for the real purpose behind the governmental action in question." (Id. at p. 320, fn. 29.) We also have in mind the reason behind the balancing test: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content

of employees' speech." (Rankin v.McPherson, supra, 483 U.S. at p. 384 [97 L.Ed.2d at p. 324].)

Here, there is no indication that CSL instructed plaintiff on proper procedure because it disagreed with the content of his speech. Indeed, the counseling letter sought to broaden the audience by assuring that plaintiff's message would reach an appropriate person responsible for acting on it. We therefore conclude the documented counseling letter did not violate plaintiff's First Amendment rights. Accordingly, the characterization of the letter as a reprimand or a mere instruction is immaterial. Thus, plaintiff's declaration that he viewed the letter as a reprimand (which he contends was permissible "lay opinion evidence") does not create a triable issue of

material fact, because the First Amendment does not prohibit public employers from reprimanding employees but only prohibits public employers from violating free speech rights.We therefore need not discuss the parties' contentions as to whether CSL's evidence established that the letter was not an adverse action.10/ 10/ In support of its position that the documented counseling letter was not adverse action, CSL cites generally to the state civil service statutes governing disciplinary proceedings. (Gov. Code, § 19570 et seq.) We note Government Code section 19570 defines "adverse action" as "dismissal, demotion, suspension, or other disciplinary action." However, CSL has not presented any authority for the proposition that "adverse action" proscribed as an abridgement

of free speech is necessarily coextensive with adverse action constituting disciplinary action under the civil service statutes. We therefore do not rely on the civil service statutes.

Nor does it matter if (as plaintiff contends) a **documented counseling letter was not given to other employees** who similarly suspected Nelson's misconduct but said nothing (thereby violating policy by failing to report misconduct). Since the letter did not infringe free speech, we fail to see what difference it makes that others did not receive the same letter. This facet would appear to us to be more appropriately part of the inquiry of causation (discussed post in connection with denial of promotions) once actionable misconduct is shown. Thus, if an employer engages in conduct that infringes freedom of speech but asserts its action was motivated by reasons other than the employee's speech, then it becomes relevant whether the employer treated

the plaintiff differently from other employees who were similarly situated with plaintiff but for the plaintiff's speech.

Plaintiff contends that if his speech was protected, then the letter was constitutionally impermissible, regardless of whether it was a reprimand. He cites Knapp v. Whitaker, supra, 757 F.2d 827, for the asserted proposition that an employer cannot constitutionally require a communication chain of command to restrict an employee's report of wrongdoing. Plaintiff goes too far. Thus, Knapp held a schoolteacher's First Amendment rights were violated by personnel action such as oral and written reprimands and a negative performance evaluation criticizing the teacher for violating school rules by

bringing her complaints to school board members rather than

the school superintendent. (Id. at pp. 834, 846.) The trial court made findings that these actions violated the plaintiff's free speech and submitted to the jury special interrogatories on whether the speech was a motivating factor and whether the same action would have been taken in the absence of the constitutionally protected conduct. Thus, Knapp did not hold that the First Amendment prohibits an employer from instructing an employee on office procedures that do not inhibit First Amendment rights. Moreover, in Knapp the employer's action did prohibit the employee from speaking to anyone other than the designated superior. The teacher was told by the superintendent: " \'If you ever contact a board member about any educational issue, I will find you

insubordinate and act accordingly."' (Id. 757 F.2d at p. 832.) The written evaluation chastised the teacher for having contacted school board members and stated: "Mr. Knapp is to refrain from contacting board members or speaking at public meetings concerning his personal employment relationships. [q] He is, however, allowed to contact board members about matters of general public interest. His insistence on airing personal problems directly with the board is disruptive and will not be tolerated." (Id. at p. 834.) Thus, although the evaluation purported to preserve the teacher's First Amendment rights, it effectively sought to prohibit him from speaking to anyone other than the superintendent on matters that the employer labelled personal

but which were determined by the court to be matters of public concern. Knapp is thus inapposite. We conclude CSL was entitled to give plaintiff the documented counseling letter to maintain the integrity of its organization, and the letter does not constitute an infringement of plaintiff's **freedom of speech.**

b. Denial of Promotions

Denial of promotions in retaliation for exercise of free speech could constitute adverse action violating First Amendment rights. Therefore, our next step is to determine "[1] whether, if protected, the speech was a substantial or a motivating factor in the action taken against [plaintiff] []; and [2] whether the [employer] demonstrated that the same action would have been taken in the absence of the protected activity, .

. ." (Gillette v. Delmore, supra, 886 F.2d at p. 1197, citing Mt. Healthy, supra, 429 U.S. 274 [50 L.Ed.2d 471].)

The reason for the latter rule is that a "rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal

candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." (Mt. Healthy, supra, 429 U.S. at pp. 285-286 [50 L.Ed.2d at pp. 482-483].)

Here, CSL submitted evidence that its promotional decisions would have been the same even in the absence of plaintiff's report to Boese. Thus, CSL presented deposition testimony of Ritter and Boese that the Sacramento supervisor's position was granted to

Boese rather than plaintiff because Boese had a long standing hardship request for a transfer to Sacramento due to the ill health of her mother, who lived in the Sacramento area. CSL also presented a declaration from its affirmative action officer, who approved Boese's lateral transfer to Sacramento based on hardship.

Plaintiff does not contend that Boese's hardship transfer was invalid or pretextual. He submits no evidence connecting the choice of Sacramento supervisor to his exercise of free speech.

As to the rejection of plaintiff for the San Jose supervisor's position, CSL submitted evidence in the form of deposition testimony and declarations from persons involved in

the selection process. The affirmative action officer attested the person chosen, Anthony Baldassano, was the most qualified candidate. When asked in deposition why plaintiff was not selected for the San Jose position, Ritter responded that there were several reasons, including the facts that plaintiff was not the **most qualified, did not have as much supervisory** experience and track record" as the chosen candidate, and did not perform well in the interview. Ritter's deposition also included the following:

"Q. Would part of your decision -- was it part of your decision not to select Mr. Mayle based on the fact he had failed to properly report what he perceived as misconduct concerning -- what were they called -- activity

reports?

"A. Certainly it was not the sole or even nearly the primary reason, but it was a reason that I thought he had used extremely poor judgment in that case."

Plaintiff does not dispute that Baldassano had superior qualifications. He does not claim that any of the factors mentioned by Ritter was invalid or pretextual.

Plaintiff's sole reaction to this evidence is to emphasize that CSL expressly listed his failure to properly report as a factor in the decision not to give him the San Jose promotion. However, the failure to properly report does not necessarily implicate plaintiff's exercise of free speech (his report to Boese), as opposed to his failure to also report to an appropriate superior within the

chain of command. Plaintiff

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also relies on documents indicating that one of the reasons he was not **selected was that he was being investigated.** However, the document (which related to plaintiff's earlier charge of racial discrimination),11/ stated that in addition to his inferior qualifications, plaintiff did not get the job because, "As a result of an informant, Agent Mayle and other agents were being investigated concerning a Lottery sting operation and the proper procedural treatment of pertinent information/evidence." This neither says nor implies any connection with plaintiff's report to Boese. Thus, it does not, as plaintiff claims, constitute an express admission that CSL denied him promotion because of his report to Boese.

Even assuming that the evidence

supports an inference that plaintiff 's speech was a factor in the decision, CSL established that plaintiff would not have received the promotion even in the absence of the Boese incident. Plaintiff presents no evidence to the contrary. CSL is thus entitled to summary judgment.

We conclude the trial court properly entered summary judgment in favor of CSL. In light of our disposition, we need not consider the parties ' other points regarding CSL' s immunity

¯/ CSL points out that plaintiff claimed all CSL's actions (but primarily the denial of promotions) were racially motivated, in a complaint filed with the Equal Employment Opportunity Commission. That claim was found to be without merit. We do not consider plaintiff

barred from alleging First Amendment violations by having previously asserted racial motivation, since multiple motivations may exist for an action.

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defense, workers' compensation as an exclusive remedy, whether a La˜or Code prohibition of retaliation applies to public employers, and whether plaintiff failed to exhaust administrative remedies on his state law claims. DISPOSITION The judgment is affirmed.

SIMS, J.

We concur:

BLEASE , Acting P.J.

NICHOLSON , J.

MemorandumCONFIDENTIAL

TO: James Mayle, Lottery Agent
Security Division
June 15, 1987
California State Lottery

FROM: L. E. Ritter
Director of Security
California State Lottery

SUBJECT: Documented Counselling - June 11, 1987

The Internal affairs inquiry regarding the allegations of misconduct by Sacramento District Lottery Agents has been completed. It was determined through this investigation that you failed to properly report to management what you perceived to be possible improper

conduct and or criminal activity involving documents submitted to the Sacramento Municipal Court and Sacramento District Attorney's Office.

You became aware of inconsistencies in Agent Nelson's activity reports. You took the tine to make copies of those documents, prepared an extensive handwritten note regarding the discrepancy of those same documents, and you subsequently provided copies of those documents to your wife, your attorney, and maintained d a personal copy for yourself

You are instructed that ln the future, should you become aware of what you perceive to be misconduct with regard to any Security Division

investigation, you will immediately report the same information to your supervisor or the proper Security Division management.

This memorandum is to remain in your personnel file for three months from this date (June 11, 1987) This memorandum will be removed from your personnel file (September 11, 1987), should there be no future incidents as indicated previously.

APPENDIX "A"

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JAMES MAYLE,) NO. 502775

Plaintiff,) **JUDGMENT**

v.

CALIFORNIA STATE LOTTERY COMMISSION AND LEW RITTER,

Defendants.

On December 20, 1990, the court granted the motion of defendants California State Lottery Commission and Lew

Ritter made pursuant to § 437c of the Code of Civil

Procedure on the ground that the action has no merit

for an order that judgment be entered for defendants

and against plaintiff. In accordance with that order,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff recovers nothing from defendants nothing from defendants or either of them by this action.

DATED: JAN 10, 1991

ANTHONY DECRISTOFORO, JR.
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JAMES MAYLE,)
NO. 502775

Plaintiff,)
ORDER GRANTING SUMMARY

JUDGMENT
v.

)

Date: December 20, 1990
CALIFORNIA STATE LOTTERY) Time:
9:30 a.m.
COMMISSION AND LEW RITTER,)
Dept.: 21

Defendants.

The motions of defendants

California State Lottery

Commission and Lew Ritter and plaintiff James Mayle for 20 summary judgment and summary adjudication of issues

came on after being specially set for hearing by the court, the Honorable Anthony DeCristoforo, Jr. presiding, on December 20, 1990. Plaintiff appeared by 24 counsel Leo Donahue with an associate and defendants appeared by counsel, Deputy Attorneys General Geoffrey 26 L. Graybill and Vincent J. Scally, Jr..

Having considered all the evidence set forth in the papers s submitted and the inferences reasonably deducible therefrom, except that to which objection was sustained, the

Court determines that there is no triable issue as to any material fact and that defendants are entitled to judgment as a matter of law.

IT IS ORDERED that the motion of defendants California State Lottery Commission and Lew Ritter for summary judgment be, and hereby is, granted and plaintiff's motion for summary judgment is denied. DATED JAN 10, 1991

ANTHONY DECRISTOFORO, JR.
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

HONORABLE ANTHONY DECRISTOFORO, JR., JUDGE, DEPARTMENT 21

JAMES MAYLE)

Case No.: 502775
Plaintiff,

vs

CALIFORNIA STATE LOTTERY COMMISSION,

et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Thursday, December 20, 1990

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, NON-SUIT, AND JUDGMENT ON THE PLEADINGS

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P R o C E E D I N G S

THE COURT: Sorry to keep you guys waiting but we've got a lot of business today. Okay, let's see, this is Mayle versus California State Lottery Commission, number 502775. This is motions for summary judgment and summary adjudication of issues, and -- let's see, just for our monitor's benefit, would you all identify yourselves for the record starting with you, Mr. Donahue.

MR. DONAHUE: Leo F. Donahue for plaintiff.

MR. WHELAN: Christopher H. Whelan for plaintiff.

MR. SCALLY: Vincent J. Scally, Jr., for defendant.

MR. GRAYBILL: Geoffrey Graybill for defendants.

THE COURT: Okay. What I would propose we do,

gentlemen, is take these -- take

each cause of action in order and have some discussion on it. I have my thoughts, but I'm -- I'm interested in hearing your own comments.

We probably don't have a real long time this morning, but we'll take whatever time is necessary.

First, let's -- the first thing let's talk about is -- is the first cause of action, the violation of the civil rights -- violation of the civil rights based upon the infringement of the First Amendment rights. And -- and, of course, this applies only to the defendant, Ritter. Is that right? That cause of action? The state is not a person under 1983.

MR. DONAHUE: That's correct. We dismissed the 1983 claim against the state.

THE COURT: Okay, so -- all right. So then -- so, the first question is whether this speech is protected speech, or not. And -- and I think the Pickering test, as referred to in Egger, at page 313, is helpful. I think the court there states essentially, as follows:

"The problem in any case is to arrive at a balance between the interests of the employee as a citizen in commenting upon matters of public concern, and the interest of the state as an employer and promoting the efficiency of the public services it performs through its employees."Could you, just in -- in like -- I don't mean 25 words or less literally, but, you know, very briefly, Mr. Donahue, tell me why you think this speech is protected, and then, Mr. Scally or Mr. Graybill, one of you, say why you

think it -- it is not protected. Okay. MR. DONAHUE: Yes, your Honor, I'd -- THE COURT: I mean, I -- I realize you've covered this amply in your briefs, but I -- I just prefer that you give me an essential synopsis, if -- if you don't mind. MR. DONAHUE: I'd -- I'd direct the court's attention to two cases, Givhan -- or, correction, Gillette v. Delmore, 886 Fed.2d 1194. THE COURT: Was that cited? MR. DONAHUE: Yes, your Honor. THE COURT: Okay. MR. DONAHUE: And the case that wasn't cited, but sent

to you a few days ago, Knapp v. Whitaker -- THE COURT: Uh-huh. MR. DONAHUE: -- 757 Fed.2d 827. THE COURT: Okay.

MR. DONAHUE: In both those cases -- cases in the Pickering analysis, they indicate two or three different elements that the court should look to, and then balance that against the disruptive effect that was caused. We say that the nature, content, and form of the speech was in the -- in the area of public concern in that he spoke these to bring wrongdoing to light, which is obviously in the interest of me as a taxpayer, and any -- and the average citizen. He protested possible criminal activity. He did it with the purpose of bringing a wrongdoer, or a wrongdoing, to light. There was no --

and there has not been any evidence submitted by defendants that indicate that this caused any problem within the work force, except that it was out of the chain of command.

And, of course, the Knapp case indicates clearly, which was favorably cited by the Ninth Circuit decision, in a -- the same case where an individual reported out of his chain of command and in violation of a written policy, for which there is no written policy here, a certain wrongdoing. And the court held in that case that the form, manner, and content to bring wrongdoing to light was indeed protected

speech.

Mr. Mayle did this in front of a witness. He did it

in an effort to -- to correct the -- the act. THE COURT: Why can't you say that the state has a mechanism in place for -- for him to -- to bring -- bring notice of the wrong. MR. DONAHUE: For two reasons, your Honor. Number one, the Lottery Commission did not have a mechanism in place. Number one, on page 99 of Mr. Ritter's deposition, he testifies that -- in response to whether there was a written policy in effect, that "every police officer knows what he should do." In other words, basing that on previous experience of the myriad of different backgrounds of the police officers, so -- THE COURT: Well, but in the counseling letter, they say, "In the future should you become of what you perceive to be misconduct with regard to any security division

investigation, you will immediately report the same information to your supervisor for the property security division management." MR. DONAHUE: That's correct, your Honor. But if it's protected speech, if this was matter of public concern, under the Pickering -- or -- or actually, before you get to the Pickering analysis the court has to make a ruling as a matter of law whether it was protected speech. In the -- in the interest of that, going on the Knapp case, Mr. Mayle's speech clearly didn't interfere with his responsibilities as a police officer. He continued to perform those responsibilities.

The -- this was not a case, as -- as one of the items

of close working relationships where his speech caused any disruption with other employees able to do their work, and as the court in Knapp said, when employees speak concerns, public concern, and it doesn't cause a problem within the office, getting into the Pickering analysis, then it -- then it's protected speech.

THE COURT: Okay. Do you wish to comment? MR. GRAYBILL: Yes, your Honor. The -- the problem I think with plaintiff's analysis here is -- is highlighted by the Egger case, which is in contrast with the Knapp case. Egger is a law enforcement case. It is Mr. Mayle's job to report wrongdoing. And that's -- that's what the Egger case focuses on. You have this unique situation where a law enforcement -- everything that a law enforcement

officer reports theoretically is a matter of -- of public concern. But, we're not that simple-minded. That's what Egger says. We look at what the job context is. It is his duty to report. And the type of right that plaintiff is advocating here would make it impossible to discipline a law enforcement officer, because all we would have to do is say, well, you're doing this because I made this report. Well, they make reports all the time. And the -- the court in Egger recognizes that that just won't work. You have to be able to discipline your law enforcement officers without the threat of a First Amendment lawsuit. It's not going to be that simple. And eight judges -- or, seven judges in the Egger case, four of them

especially, came on very strong on that principle, they don't think you can ever state a First Amendment claim in that context. And I think that -- that plaintiff is simply ignoring the facts when he says there was no disruption involved. The -- the -- Pam Nelson, who was the object of his report turned right around and filed a claim against him for violating her Fourth Amendment right to privacy. And that presented Mr. with no choice but to conduct an investigation of that charge, as well. charge, as well. And the investigation uncovered a great deal of hostility. So I think we're ignoring reality here when we say the disruptive policy factor that is taken into consideration in the Pickering analysis, and, as the court

recognized in Egger, is an inevitable part of such a report, especially if there is a degree of vindictiveness behind it. so, I think from the standpoint of the First Amendment Pickering calculus itself, is that Egger is the case that's -- that's on point, and the the law enforcement context is recognized there as unique. And it's -- it's difficult, it's not easy, as the plaintiffs are trying to put forth, to state a First Amendment claim in that -- in that context. And I would also point out to the court that part of the First Amendment calculus stating that a cause of action under the First Amendment is to connect the alleged reporting to some wrongdoing, some injury caused as a result of that, and motivated by that, motivated by a retaliatory motive.

And that's not here. In items 13, 14, and 15 of the separate statement of issues, where the defendants set forth their supporting evidence for the fact there's no causal nexus between his alleged reporting and the appointment of Mary Ann Boese as the Sacramento supervisor or the appointment of Anthony Baldassano as the San Jose supervisor, or indeed, his documented counseling. As your Honor has just read from the documented counseling letter it is not a situation where he's being told, don't report, you know. He's being instructed as a police officer in the proper manner of reporting. And if they can't do that without violating the First Amendment, there isn't going to be any way that supervisors in law enforcement can

supervise their their people.

THE COURT: Okay. Brief common on this and then I'll go on to the next MR. DONAHUE: The the protected speech speech analysis is that in this case, in in reality, Mr. Mayle observed possible criminal activity. There's no question about that, that's what the discipline was for, is for improperly reporting possible criminal activity. He saw this occur. He believed at the time that his supervisor was involved with it. He believed at that time that the chain of command was either involved in it or would not do anything about lt. He went to an attorney and sought advice. The attorney said report this to a supervisor. He reported

possible criminal activity. The falsification what he believed at the time to be falsification of evidence to a third party, to a supervisor. He was disciplined for that. It doesn't have anything to do with whether or not another agent filed a claim, or didn't file a claim, or whether there was an investigation. In fact, the investigation was not initially against Mr. Mayle at all. And then it turned into that.

THE COURT: All right. Let's on the same subject here, let's just have a very brief discussion, assuming that the speech is in fact protected speech. MR. GRAYBILL: Your Honor, who would you like to address that first?

THE COURT: Well, why don't you go first. MR. GRAYBILL: okay.

If it if it is protected speech, your Honor, then Mr. Ritter is entitled to qualified immunity as the court found in Egger and in Siegert, as well. And the only way that that immunity can be overcome in this context is for the plaintiff to come forth with a smoking pistol that shows that what Mr. Ritter did in these instances was motivated by retaliation for exercise of this recognized First Amendment right. That simply does not exist in this case. In the Burgess case, which has been brought belatedly to the court's attention, is not helpful at all to the plaintiffs in this regard because the court found that the the plaintiff himself, and witnesses, had indicated that Mr. Burgess had been told to shut up, not to give his views to

the city council and others, and was discharged after he did that.

So, there's a smoking pistol in that case, and in the Siegert case there's a graphic demonstration illustration of what is required. and the Siegert case points out that the FBI investigation entitled Cointelpro, in the '60s and '70s, designed to disrupt the political activities of what the FBI and others viewed as undesirable political activity, there was a memorandum that was found through the Freedom of Information Act, where the FBI is saying exactly that, "We're going to disrupt their political activities." That's the kind of smoking pistol, and Burgess points that out, too, that is necessary to overcome the defense of qualified immunity. And that simply doesn't exist here.

Plaintiff can't even point, in the separate statement of issues, to evidence to establish a causal nexus between his alleged reporting and the wrongdoing that he is claiming occurred to him. That is, the denial of those two promotions or his failure to get them, and the documented counseling letter.

THE COURT: Okay. MR. DONAHUE: Your Honor, again, I'd refer you to Manhattan Beach and the Burgess case, and it talks about an analysis of qualified immunity and the standards to be used, both before and after discovery. and it says clearly that if it's after discovery the court's only analysis is, was there a factual dispute concerning the issue. And here obviously there is.

THE COURT: Well, I'm I'm I have a problem with that, to tell you the truth. We're here on summary judgment and declarations have been submitted and deposition references to the effect that that there was no retaliation. And that has the effect, for summary judgment purposes, in shifting the burden back to the plaintiff now, to come forward with with admissible evidence raising a triable issue of material fact.

The only the only evidence in contradiction to the defendants' evidence is are are the declarations of the plaintiff himself. And if the if the plaintiff were on the witness stand and offered that kind of testimony and objection was made to that testimony on the basis of hearsay, opinion, conclusion, speculation, those objections would

be sustained. And that's the problem with his declarations. They do not contain admissible evidence, that I can see. MR. DONAHUE: Can I address that, your Honor?

THE COURT: Yeah, sure. MR. DONAHUE: If Mr. Mayle's attempted reporting, or actual reporting of possible criminal activity, which ©™ which in our mind is is clearly protected speech, both under Manhattan Beach and the Burgess and the Gillette ©™ THE COURT: Well, I mean, this part of the discussion is assuming that it is protected. MR. DONAHUE: Okay. If he's if that's protected, and if you look at the Knapp case, it is constitutionally impermissible for them to then discipline him for reporting, as he did, out of his chain of command. And that's cited

favorably with the ninth Circuit. It said, his Burgess, who reports out of his chain of command, and then is disciplined for it, both in oral and written reprimand, on page 846 of that decision, they indicate that, "Thus, in view of our holding that Knapp engaged in constitutionally protected speech, each of the defendant's foregoing actions were constitutionally impermissible," and that includes the written reprimand, the oral reprimand, the reference later on in his performance report, that by you reporting this out of your chain of command, we discipline you for that, we chastise you for it. And they clearly say in there that that's constitutionally impermissible.

Now before the court is evidence, and it's admitted in their papers that they did administer now, whether you want to call a letter of counseling, it's called the documented counseling, on June 11th, and they admit that they talked to him on June 11th and then administered this letter on June 15th. I mean, that's that's clear enough there. THE COURT: Well, what's so bad about that, saying, hey, in the future, this is the way we want you to do it? What's so bad about that?

MR. DONAHUE: It's the it's the identical fact pattern to the Knapp case. What's bad about it is that it has, number one, a chilling effect on his on his on his free speech, and it's constitutionally impermissible. If that's protected

speech, they cannot THE COURT: Had a chilling effect on him, what what a how is the department to operate if you can't if you

can't say, hey, next time I want you to do it this way? mean, nobody nothing everything would be gridlocked. MR. DONAHUE: It wouldn't be gridlocked.

THE COURT: Nobody would do anything.

MR. DONAHUE: It wouldn't be gridlocked. It would be the situation where and like they said to him, how do you report this his prior experience says, sure, you go to your immediate supervisor. But what if your immediate supervisor is the one who's falsifying it, where do you go then? What happens then? And and THE COURT: Were you ever in the Army? Sure you were. Weren't you? Weren't you in the service? MR. DONAHUE: I was in yes, your Honor, I was. And there were situations that

THE COURT: Well, then MR.

DONAHUE: that THE COURT: and and yeah. MR. DONAHUE: that involved not doing that. And you you have to say, am I going to take the personal risk to say that we're bombing an area that we're constitutionally not supposed to bomb, should I report that or not.

THE COURT: I was a little bit more simple than that. I was saying, you know, if if your first sergeant was a bad guy, would you go to the company commander?

MR. DONAHUE: Well, the situation happened to arise personally for me in in a scenario, and I couldn't go to the individual. And if it's this is THE COURT: Okay.

MR. DONAHUE: clearly identical to Knapp. THE COURT: Okay, well, i've I've got your point. I've got your point. What's your response to that to Knapp?

MR. GRAYBILL: To Knapp, your Honor, is that that's not © the Knapp situation is not the performance of a duty to report as it is it's just apples and oranges. And that's what the Egger case makes so clear. It's -- it's not just a

question of of reporting out of the out of the chain of command, and that type of situation. This is a situation where he's simply being instructed as to how to do it. He's not being transferred, discharged, or anything like that. It's it's very straightforward. It's it's not the Knapp facts at all,

it's Egger. THE COURT: Mr. Donahue, are you saying that I have to find as a matter or, that I should find as a matter of law that, by virtue of the fact that this counseling letter was issued, that that constitutes a violation per se of his constitutional rights?

MR. DONAHUE: No, what I'm saying is, your Honor, is that the the issue of law is whether or not it's protected. Then I believe the Pickering analysis says that it's a factual dispute as to whether or not it weighs between the the the disruption of the public entity versus his rights as a private citizen. THE COURT: That's a mater of law. That's a question of law. MR. DONAHUE: Well, I believe the

THE COURT: I think that's a question of law. MR. DONAHUE: the constitutional question is I mean, the question of law is whether or not it's protected. THE COURT: Yeah, right. MR. DONAHUE: And then I think whether or not the Pickering analysis I believe that has to that's a factual dispute as to whether or not there is evidence where it is or is not.

THE COURT: Okay. and that's what that's what I'm trying to talk about. The evidence I have before me is that there was no retaliation and that this letter was not a form of retaliation. We didn't pass him up for a promotion in retaliation, we passed him up because there was somebody better. So that's

evidence. Now, that shifts the burden to you to say, well, there was retaliation in that de-dum, de-dum. Well, the only retaliatory evidence you are offering is inadmissible evidence, in my view. That is, in the form of the plaintiff's declaration that I was ostracized, for example. And I was passed over for promotion. See.

MR. DONAHUE: If THE COURT: So so MR. DONAHUE - I don't see what you're saying. THE COURT: so if we don't if we don't have a triable issue of fact there, then it seems to me, even if the speech is protected

MR. DONAHUE: Well, I'm saying, if the speech is protected

THE COURT: if you mean like --

MR. DONAHUE: if it's protected speech, then I believe under Knapp they were it was constitutional impermissible for them to say, you can't report wrongdoing except within the chain of command. Especially under these circumstances where the chain of command in his --

THE COURT:So you're saying as a matter of law -- MR. DONAHUE: in his eyes were tainted.

THE COURT: so so I would have to in effect direct a verdict in his favor without without knowing?

MR. DONAHUE - I believe it would come down to a matter of jury instructions; if you find this, if you find that. Now, in addition to that, Mr. Mayle a copy

was given to him of a report concerning a sexual I mean a race discrimination complaint that he filed. He can testify from that report, the report will be admissible evidence, that in there it says, "Mr. Mayle was not promoted because he was under investigation . . ." for reporting this. Now, that's that's that's clear evidence, and Mr. Mayle can testify to that fact. He was the receiver of the report. And the individual can testify to the fact --

THE COURT: that was only one of the reasons. MR. DONAHUE: who wrote it. If it's if if that's one of the reasons, and it's constitutionally permissible, the entire reason may fall --

THE COURT: All right. MR. DONAHUE: the entire

THE COURT: Okay. do you have any comment on that -- on the report? M R . GRAYBILL: The - THE COURT: the fact that MR. GRAYBILL: the report that he's THE COURT: he the investigation? MR. GRAYBILL: that which report now are we talking about? THE COURT: Well, the report that he -- MR. GRAYBILL: State Personnel Board?

THE COURT: yeah, that he received saying that as Mr. Donahue says that he was passed over because he was under investigation.

MR. GRAYBILL: Well, that isn't that isn't the finding of the State Personnel Board MR. DONAHUE: It's not the State Personnel Board, it's the affirmative actions's report that concerns the internal

affirmative action's report that concerns a complaint for a sexual or, racial harassment. MR. GRAYBILL: Well, that is I don't that's the personnel board, which is the entity that that finds the facts, did not find those facts and neither did the EEOC. The and besides, taking it back, that investigation was of charges brought by Mr. Mayle and charges brought against him by the the suspect, or the alleged malefactor, the person that Mr. Mayle pointed out as as possibly doing something wrong, said that he did something wrong. And it's simply the the investigation was conducted as it had to

be. It wasn't to it wasn't the only reason that Mr. Mayle was the focus of the investigation is because another officer caused him to be, not Mr. Ritter. those are the those are the facts. And as Egger points out, you don't get to the jury on those kinds of facts because a law enforcement manager is damned if he does and damned if he doesn't, and we're not going to put him in that situation. That's what the Egger court says. And --

THE COURT: Of course, we're not talking about non° suit, we're talking about summary judgment. So, we're not talking about not getting to the jury. MR. GRAYBILL: Egger Egger was a a summary judgment case THE COURT: Okay. MR. GRAYBILL: your Honor. And there were a helluva

lot more circumstantial facts in that case than there are here. There aren't any there aren't even any circumstantial facts here.

THE COURT: Okay. All right.

MR. DONAHUE: Your Honor, if if I could. If because if this is protected speech, and and this poor individual who tries to do his duty, he feels his chain of command is tainted, and reports it to someone else, and if it's protected speech, and if there is an admission by defendants in the form of an internal affirmative action discrimination report, which he filed because he couldn't figure out why he had missed these two promotions, and in

there it says you're not being promoted because you're under investigation, before you're convicted, before anything, because you're under investigation, and that's wrong, then, clearly, there's there's a there's a retaliation clear enough to get to get to a jury.

THE COURT: Would you excuse me for a moment, please. [Off the record.] THE COURT: Okay, well, any other final comments on -- this issue before we move on to the next -- MR. DONAHUE: I would like to make a couple of comments, your Honor. THE COURT: Okay. MR. DONAHUE: In real life what we have is an individual trying to do his job, to come forward where he felt and went

to an attorney to talk to about, I think these people are tainted, something has to be done. He got advice to do it. He was disciplined because of that, and there's no question about that because that's an an admission. When he was under investigation the the affirmative action's report, Mr. Ritter, writes in the report one of the reasons that he was not selected for promotion was because he's under investigation, which is guilty before you're you're proven innocent. The Eggers case, it it talked about, and we're mixing apples and oranges a little bit, because Eggers, in some of the argument we're talking about, concerned qualified immunity. And one of the reasons they talked in Eggers about

it was constitutionally it has to be you have to be clearly, objectively, unlawful. Givhan was just then decided, and one of the three reasons in Eggers they say is that the First Amendment qualified immunity made alliance is because the individual didn't know that there was there was that it was constitutionally impermissible to do it. Now, Manhattan Beach and the Burgess case talk about it's clear that you can't do this now. And I say the line of case is that California has followed that.

The Burgess case Knapp case indicates almost an identical identical fact pattern, that here's an individual who's trying to do that reported something against policy, and the court said that that's impermissible to restrict it that

way. I can see the court's concern to say, well, gee, they've got to have some internal policy. Well well, that's correct, and they should have some internal policy. And the chain of command, as far as my service in the military was, you follow the chain of command explicitly. But when it's a matter of falsifying records that are going to be turned over to a defense firm to prosecute a case, and you feel, based on evidence that you've had in the couple of days before, that it's not going to get done if I report this this way, and you do the best effort you can and report it to someone else, and then lose promotions because of it, and are retaliated against by this letter and oral reprimand, which Knapp found to be sufficient THE COURT: Okay.

MR. DONAHUE: clearly.

THE COURT: Okay. Any last word? Okay. All right,that's the last word on this, then.Okay, let's talk about the second cause of action,intentional infliction of emotional distress. Mr. Donahue, I would just tell you that I think Cole is applicable here. I mean and I'm sure you're you know, Mr. Whelan, are well aware that in law and motion for the almost year and a half that I was there, and I'm sure they're still holding the same way, that Cole is applicable in a situation like this. That -- MR. DONAHUE: Can I talk a little bit about Cole?

THE COURT: Well, yeah, of course.

MR. DONAHUE: The primary distinction we'd make, which is current law, is that Cole never mentions, nor is it applicable to,

statutory causes of action; it concerns common law, only.Cole itself, as you know, upholds the Renteria line of cases and the federal courts have followed the Supreme Court's line in this also, saying that if there is no physical injury, or it's only alleged as a make way to emotional injuries, then it isn't. Now, along comes Hart, and Furdugo Hills/Georgie, which was decertified, of course, that we're going in that direction THE COURT: This doesn't come within the Hart situation. MR. DONAHUE: I don't think it does, either, because think it's well beyond the normal expectations of work. THE COURT: Oh, really MR. DONAHUE: Because THE COURT: why, I mean MR. DONAHUE: and I've asked, and THE COURT: Hart is- is well beyond the normal

expectations of work, but this isn't

MR. DONAHUE: Well

THE COURT: is it? MR. DONAHUE: I think the way that that the trend is going, and and we know that Renteria exception still applies, Hart says the Renteria exception still applies. Hart also says that you can't hide behind the shield of workers' compensation when you're doing things that an employer shouldn't do. I don't think it's within the normal expectation of anyone to be sexually harassed. Jones says workers' comp does not cover that. Racial harassment, Watson, I believe says workers' comp does not cover that. Here is a First Amendment constitutional violation that is equal, statutory violation, equal in those and I would think that were

it to fall under those cases, which are newer cases than Hart, and which put some limits on workers' comp.

I think a year and a half ago, in law and motion, we were we were drifting off to the right side of the of the agenda. And then there was a series of cases with Georgie going away, that now puts some limits on it.Now, along with this, as you know, the Shoemaker case

is up before the Supreme Court right now, and the questions that they apparently asked the individuals that argued this case were, are you telling me that if someone blows the whistle, and you think whistleblowers that come forward,they're going to get $142 a week. And that has to be out by January 4th, that's 90 days from the day it was heard.

Of course, that'll I think resolve the matter, if it if it goes along that line. So, we think the trend is, considering the -- Hart -- Cole does not cover statutory causes of action, considering the fact that Jones and other cases now say when a statutory important right race discrimination, sex discrimination is involved, it doesn't come within And the other element that's coming forward now is,like Jones mentions, for separate

wrongs there are separate schemes and rights. And we don't want to impose on a workers' compensation insurance demands that it's not intended to do, and to keep that separate and and distinct. And we think that's the trend, and that's -- that's where it's going. THE COURT: What's your comment?MR. GRAYBILL: Your Honor, I believe you asked us to address the intentional infliction of mental distress cause of action, and as Mr. Donahue pointed out, that is a common law cause of action, so under his own analysis he's out in the cold.
THE COURT: Okay, anything else on that cause of action?

MR. DONAHUE: Your Honor, as you know, intentional infliction of negligence -- negligent infliction is attached to the underlying cause of action and this is a statutory violation. THE COURT: All right, let's talk about the third cause of action. Actually, it's it's your motion so why don't you go first. MR. GREYBILL: Is -- is the wrongful termination?

THE COURT: Well, this is unlawful retaliation under the Labor Code 1105, and whether or not it's preempted by Government Code

MR. GRAYBILL: Your Honor

THE COURT: 10540. MR. GRAYBILL: -- there -- unlawful retaliation that first of all, the Labor Code doesn't indicate the employer for the purposes of that provision is covered and even if it

were, it is preempted by the specific provision which has an administrative remedy that needs to be exhausted and is very precise

THE COURT: I supposed that's yeah, that's that's what I want to talk about. The Mr. Donahue, let's let's assume I mean, do you obviously, you do not concede that the Government Code is applicable to this situation, or do you?

MR. DONAHUE: Well, your Honor, as we submitted, we think unless they have a unique argument concerning intent or new statutory interpretation that the the Labor Code obviously has to apply unless they can point to specifically

where it doesn't apply. And there's obviously portions of the Labor Code that doesn't-- do not -- THE COURT: Well, isn't the language of the Government Code essentially the same as the language of the Labor Code 5 and and it specifically applies to public entitles I mean, Government Code? MR. DONAHUE: I assume you're speaking of 1054 and 1054. THE COURT: Correct. MR. DONAHUE: We see that a little bit differently. In that we're in the conundrum where what can a state whistle°blower do? Is it under Shoemaker because that's under consideration? Can he do anything? And we filed, under the impression at the time, that perhaps 1054 and

548 were not available to us, and we filed with with the Labor Code in mind, and and and we have done this successfully with with government entities before.

Let me point out a couple of funny things about 105481 and 1054. 10548 talks about if you report activity it concerns reprisal or retaliation for reporting or attempts of reporting for improper acts under section 10543. Now, 10543 talks about threatening or coercing or intimidating persons because they report evidence report wrongdoing to the joint legislative audit committee and/or the auditor general. Now, we read those to say, if you're intimidated because you reported to those two agencies, then 10548 and 10543 may apply. And that's why we couched

, the term the

case in First Amendment violation and under Labor Code. And we filed with the state under the appropriate 911.and 945.6 and .4, et cetera, the State Board of Control, which which of course we submitted.

So, that was the conundrum we were in, is that the First Amendment violation, what rights does he actually have? Is it Labor Code? Does this Government Code apply, or can I be eliminated because I didn't specifically go to the audit committee or the legislative audit. And and we filed it in the manner that we filed it because of that, your Honor. MR. GRAYBILL: Your Honor, there is no such limitation in that Government Code provision. He's talking about a superseded version that was superseded before

his cause of action arose. And in his briefs, of course, he doesn't make that argument at all.

The argument that he's making is that this case that's pending before the California Supreme Court, which, when it was taken for hearing, expunged the the lower court decision, the the Third District Court of Appeal's

THE COURT: So we can't yeah, we can't rely on that. MR. GRAYBILL: That's right. And he's he's claiming in his papers that was the reason that he didn't claim under this Government Code provision but when the California Supreme Court changes the law he's going to amend to put that in. So he obviously thinks he's he's got a cause of action on and he has no excuse for not

bringing it forward. And he used the wrong code section, the Labor Code provision. I happen to know since he brought it up himself, he's trying to say that he's been successful with it before. I happen to know that in another case, the Alexander case, he was not. In law and motion in this court that came to the same conclusion that we're advocating here, that the Labor Code provision does not apply, that the Government Code provision does. So THE COURT: Okay. Well MR. GRAYBILL: I think that's kind of fundamental.

MR. DONAHUE - can I

THE COURT: I mean, you're you're not saying that I mean, if if the Government Code sections do apply, are are you contending nevertheless you have exhausted your

administrative remedies as required therein? MR. DONAHUE: Oh, oh, we think we have. He's a state employee and the the Government Code in the 900 series says we've got to go to the State Board of Control, you're a state employee. He went to the State Board of Control, we submitted that THE COURT: Says you have to go to the State Personnel Board. MR. DONAHUE: Or State Personnel Board, I'm sorry. THE COURT: Well, that's a different board, that's not the Board of Control. He didn't go to the Board of Control. MR. DONAHUE: No, it says you have to go to the board,- and the board is defined as the

THE COURT: As the State Personnel MR. DONAHUE: State Board of Control. THE COURT: No, I think the Government Code talks about the State Personnel Board specifically. MR. DONAHUE: It says THE COURT: Just a minute, 10548 MR. DONAHUE: it says "board," 940.2 "Board means in the case of state, the State Board of Control.

THE COURT: Yeah, but I'm looking at 10548, subsection(c), last sentence, "However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the state Personnel Board, pursuant . . . " et cetera.

MR. DONAHUE: Okay, and what what we're saying on that, your Honor,

is, because under 543 we didn't report to the legislative audit or the audit commission that this this was not a concern. When when this case was filed, Mr. Messing went under the Government Code 940. 946.4, filed with the State Board of Control, to notice the state that an action was pending. Which, the Jones case, I believe, says that's the purpose of an administrative a exhaustion requirement. He filed that. He alleged that, "I was retaliated against for reporting activity . . .," et cetera. We did not file or, Mr. Messing did not file under 548 or 543; he filed the constitutional issue of freedom of speech. And then he and he noticed the state under the applicable Government Code to the State Board of Control

that was

coming down the pike. We amended the complaint because we also felt that 543 because we didn't go to the legislative or the audit, we may get thrown out of court, we alleged constitutional violation, first noticing them under the appropriate Government Code, and those documents are submitted, and then we filed under the Labor Code, knowing that under Shoemaker, because it had taken up, we we couldn't rely on that.

Now, what we do if Shoemaker comes down as says a state whistleblower has an action, I don't know; we'll have to wait and and see. So, that's why we filed under the Labor Code and the Constitution.

THE COURT: Well, you know, just under the Labor Code, have you found

any cases that that are cited under the Labor Code that deal with public entities? MR. DONAHUE: Not one way or the other. This is a brand new basically a code section --

THE COURT: Well well, I --

MR. DONAHUE: And -- and we can't find any either, but -- and we relied on statutory analysis. THE COURT: Okay. All right, let's talk about the fourth cause of action. This deals with are I'm not sure, did did you actually oppose the the motion on this one, Mr. Donahue?

MR. DONAHUE: No, this is it's regarding -- THE COURT: In violation of freedom of speech under the California Constitution?

MR. DONAHUE: Right. I think that's before the court. The freedom of speech under the California Constitution, we alleged that, and and would like to keep it there, because it's a more basic freedom of speech. As you know, the federal Constitution says no law shall issue. The state Constitution says that you have an affirmative right to freedom of speech, so it's a little broader and a little deeper than the than the federal Constitution. And it's and it's -- THE COURT: Do you wish to make MR. DONAHUE: expressed --

THE COURT: well, okay, go ahead MR. DONAHUE: affirmatively T H E COURT: you you well, okay, fine. All right, fifth cause of action, wrongful discharge and wrongful termination in violation of public

policy. All right, this is the issue as to whether or not we have a resignation or a retirement, and what's why don't you summarize your position on this. MR. GRAYBILL: Your Honor, we believe that all of the authority, including the BAJI instructions, indicate that there has to be a resignation or a termination. That's simply not the case here.

There is a voluntary retirement for disability with automatic reinstatement rights, when it's determined that this disability is no longer in ln effect. And that's that's the cases deal with a resignation under duress, or a wrongful termination, in fact, the termination.

THE COURT: Well, yeah, but he he says that he did resign.

MR. GRAYBILL: I beg your pardon, your Honor? THE COURT: In his declaration he said he did resign, didn't he? MR. GRAYBILL: Well, that's a legal conclusion that he's reaching. Before, in all his declarations, it indicates that he left because the stress was too great, and and the retirement documents indicate and he voluntarily applied for retirement.

THE COURT: Mr. Donahue.

MR. DONAHUE: Again, I'd direct you to the Sanchez case, your Honor, that that we submitted. That's a case almost identical as to this one, and in that case the individual left work one day on a sick never came back, did receive, eventually, a 26 percent disability retirement. And the court

contended in there that, looking at it, that, under Satterwhite, in the cases that we cited, "A constructive discharge occurs when looking at the totality of the circumstances, a reasonable person in the employee's position would have felt he was forced to quit or because of intolerable and discriminatory working conditions . . ."

Now, he left the job. He got that letter of reprimand and walked off. Now, if later on I mean, he was told by his doctor he couldn't go back to work and he got a disability retirement, are we saying that for you to now have preserved a cause of action, you can't feed your family; you you must not accept this disability.

But the question, I think, is a factual dispute, as the Sanchez court says, "whether working conditions were so intolerable and discriminatory as to justify as reasonable employee's decision to resign, is normally a factual question for the jury."
And and we think that's the issue, whether if if he got a disability at some time later, does that really affect what happened to him that that day. And we think that the definition of constructive discharge was was just that, and that's a factual issue. MR. GRAYBILL: Your Honor, I think the bottom line is whether he cut off his employment rights there. And, you know, I don't hear Mr. Donahue saying that, no he doesn't have the right to return under this disability

retirement. There was no termination. He did not resign and cut off those rights, and he was not terminated. And I think also, as Mr. Donahue pointed out earlier, the wrongfulness is the First Amendment violation, and if there's no First Amendment violation this, as Mr. Donahue likes to say, is a make-way, it would fall as well.

MR. DONAHUE: Whether he received disability after what occurred to him, and whether or not because he's receiving disability, precludes a constructive termination, I think are two different two different questions. If he left work and his doctor told him, you are not permitted to go back to work because of the stresses, clearly under Satterwhite, and and the cases we've cited, that the conditions were so

intolerable and discriminatory that he was

forced to resign. In other words, the will was removed from him. It was not his wilful choice; rather, it was fostered upon him because of the working conditions. And that's clearly what happened. Now, there may be a question of of of disability offsets later on, or or whatever, but I don't think that acts on on the termination aspect of it. after occurring events. MR. GRAYBILL: Your Honor, there's there's also the the problem of causation that would be involved in this cause of action, and as we discussed earlier, there simply isn't any evidence of retaliation --

MR. DONAHUE: And and, your Honor --

MR. GRAYBILL: or nexus between his alleged whistle-blowing and the things that he's --

THE COURT: Well, even even if --

MR. GRAYBILL: complaining of.

THE COURT: even if it's there, doesn't he have to exhaust his administrative remedies, in any event? I don't know. MR. DONAHUE: Yes, I mean, that that would be something that he could appeal to the Personnel Board, that's for sure State Board of Control, which he did, your Honor. He filed a complaint with State Board of Control. THE COURT: Okay. Let's let's talk about the sixth cause of action. M R . DONAHUE: Sixth is a 1983, your Honor, that we

dismissed against the state and Lew Ritter, in his official capacity. THE COURT: So who's left? M R . DONAHUE: Lew Ritter in his independent THE COURT: Oh, it's left against him. MR. DONAHUE: In his-- as an individual. THE COURT: Yeah, right. MR. DONAHUE: And and which is THE COURT: All right, what's your comment? M R . GRAYBILL: Your Honor, I don't see this as being any different this is a restatement of the First Amendment violation as I see it. And unless your Honor has any questions in that regard. THE COURT: No. No, I don't. So, if the first cause of action fails, then this one would fail. MR. GRAYBILL: I believe so, your Honor. THE COURT: If the first if the first one survives, this one survives.

Right? MR. DONAHUE: The benefit to this one is punitive damages, your Honor. THE COURT: Okay. Anything else? All right, is the matter submitted now at this point? MR. GRAYBILL: Yes, your Honor. MR. DONAHUE: Could could I have one

THE COURT: Yeah, sure.

MR. DONAHUE: Your Honor, I'd like to revisit the protected speech analysis THE COURT: Okay.

MR. DONAHUE: if you think it's necessary.

THE COURT: Go go ahead. Yeah, go ahead. MR. DONAHUE: The and I don't think your Honor is hung up on the fact that it was made, not to a public but to a private, because I think the internally, the law is clear on that, but that's still protected. The analysis of of protected speech under the Pickering balance test waives his interest as a citizen in discussing it, versus the the employer's interest in promoting efficient public services. And I'm looking at the Knapp case on 842. If -- if that's the case, there was not any evidence presented that would indicate that his reporting of this disrupted their successful operation.

In fact, it should be encouraged that if an individual feels that his supervisor is tainted, my gosh, what what should he do? What what -- what should he do? He should somehow report it, and it should be reported to someone who's who's obviously in a supervisory position. He it --

THE COURT: Well, you know, why why shouldn't he do that first, and then if nothing happens, consider alternatives? MR. DONAHUE: A week before this occurred, he had thoroughly briefed Mr. Ritter on a possible perjury violation that he was involved with. Mr. Ritter then went before Judge Lytle and indicated -- THE COURT: Well, is is that any of that in the record here?

MR. DONAHUE: It's in-- it's in- - THE COURT: Well, but I mean, it's not part of the motions here? MR. DONAHUE: No, it's not part of the motion, but his his concerns were that he had done just that the week before. He had gone and briefed Mr. Ritter. And then when it went before the court, Mr. Ritter indicated to such a degree that Mr. Mayle may may be responsible, which --which caused quite a bit of concern for Mr. Mayle. Fellow officers called him from all over the state saying, "What are you doing?" "What's wrong with you?" "You used to be a good police officer," et cetera. He went to see Mr. Messing because of that. Then, when he was seeing Mr. Messing, and CAUSE, which is the employees' union, this incident came

up where he observed falsification of records. He was extremely gun-shy, and felt that if he went ahead with it, it was going to be covered up again. And there was going to be some sort of effort made to perhaps THE COURT: I don't remember I don't remember seeing any of that. MR. DONAHUE: put him on hook, but I'm I'm trying to tell you THE COURT: Okay, none of that's before me. MR. DONAHUE: that well, that's right, your Honor. THE COURT: Well, I mean, so well, I mean MR. DONAHUE: So, his I'm saying that his state of

mind

THE COURT: Well shouldn't really talk about it if it's not before me. MR. DONAHUE: his state of mind was at the time that if he went to his chain of command, either he would be retaliated against, which was in fact true, or nothing would be done. He consulted an attorney concerning this, and the -- and the decision was made that you should report this to someone not in the chain of command.

This is when he heard his direct an individual directly above him indicate that the documents should be altered or falsified. And it was a rational, conscientious, police officer type of decision. Yes, it has he could have just be quiet about it; he could have said nothing

about it, but he took the extra step at great risk to himself to report it, with the intent that something actually be done about it. Which, I think should be encouraged. And and there was no evidence submitted by the Pickering balance that that the fact that he reported it to someone else was a -- a disruptive to the work. That would outweigh his right as a private citizen to bring forward matters of possible criminal activity, falsification of records, something that you would probably encourage to do to it. THE COURT: All right, is there anything else, gentlemen? We've got to move on here. MR. DONAHUE: Your Honor, do you want any information on the issues that I just brought up as to why he why he

did report that? I can we can submit before the court - THE COURT: No. No, I mean, it's it's here now, and I think everybody has submitted everything that's -- that's appropriate at this time, so I'm not I don't I don't want I don't want to protract it. I mean, I'm -- I'm assuming that everybody has filed everything that they felt was appropriate, and and that's what I've considered, and that's what I'm basing my decision upon. And I don't think anybody was rushed for time.

Well, okay. As you may have gathered, I have -- really is it submitted? MR. GRAYBILL: Yes, your Honor. MR. SCALLY: Yes, your Honor. T H E C O U R T : Submitted? MR. DONAHUE: With with the caveat, your Honor THE COURT: You don't want to submit it, do you?

MR. DONAHUE: that THE COURT: You just don't want to submit it. M R . DONAHUE: if extra evidence is needed, that is the I don't want to see Mr. Mayle lose a cause of action because of a THE COURT: Well, I MR. DONAHUE: because of this. THE COURT: I mean, you know, you're you're a tremendous advocate, obviously. I mean, of course, you don't want to see him lose anything. But but I'm asking you now whether you're ready to submit the case as it stands to me for decision. If you're not, say no.

MR. DONAHUE: We'll submit it, your Honor. THE COURT: But, I mean, I don't want you to say you're submitting it if you if you don't mean it. I mean, do you mean it? MR. DONAHUE: Well, I'd like to present other evidence based on what -- you know,what I'm hearing this morning. THE COURT: Don't you agree that that a judge should decide a case upon the evidence and and the pleadings that are before him, and that ultimately, in in any instance, you could keep going forever. So, shouldn't shouldn't certain things come to an end at a at a designated time? I mean, this is a motion for summary judgment. Now, you're not asking me for additional

time to conduct additional discovery, are you? MR. DONAHUE: No, your Honor.

THE COURT: All right. You're asking for additional time to submit another brief, another what? I mean, what's what's MR. DONAHUE: We would submit another THE COURT: what authority MR. DONAHUE: we would submit another declaration that includes the affirmative action's report where he was not promoted, and we would submit a declaration outlining the events more clearly why he felt it was in the best interest of the lottery, and and to report this to a third party supervisor, rather than using his tainted chain of command

THE COURT: Is any of that none of that's unknown

wasn't known to you at the time. That was a that's a been available, hasn't it?

MR. DONAHUE: Yeah, that's correct, your Honor. THE COURT: So, I mean, it's not as though you're out seeking new new evidence?

MR. DONAHUE: No. THE COURT: You just want to submit evidence that already exists, and that has existed, and had existed at the time that all this was filed. Right? None of this is hac come up since this was all filed, has it? MR. DONAHUE: No. THE COURT: None of that which you're referring to. Well, I I think I've got to rule on it.

I think I think on both sides your records are protected, so and that's one of the reasons I wanted to have a what I hope has been a reasonably

thorough discussion and and everybody having been given a reasonably full opportunity to to be heard.

And as to the first cause of action, I am just not persuaded that the speech is protected. And I'm not I'm I just do not feel that it's protected. And, even if it were protected, you know, that's the thing, even if it were protected, there is no triable issue of material fact that I can find as to the allegation of retaliation. The only admissible evidence is contrary to that. You've got well, for example, the Fontanek declaration. Six candidates were interviewed, including the plaintiff, and and Baldassano was the most qualified.

Ritter's

deposition: [reading]

"Plaintiff was not the most qualified of candidates interviewed. He did not have the experience the top two candidates had, he did not have supervisory background, and and a track record. His answers were not as thorough and complete." And and then was some reference to other things. Fields' deposition. She she testified that there was no request for adverse action against the plaintiff. And and, of course, as you're as you're aware, and I can refer you to, you know, the Ritter Group publication, sections 10205 and 10119, declarations may not consist of hearsay or otherwise in the admissible opinions and conclusions, and conclusions of fact

or law are not sufficient, are not sufficient in allegations that might be sufficient for pleading purposes are not sufficient as evidence.

And, of course, here I need evidence, I need admissible evidence and that's what I was referring to earlier, that I had trouble with Mr. Mayle's declarations as being inadmissible opinions.

And, now, as Egger stated on the factor of being ostracized, of course, you're talking he was talking in the Egger case, as yeah, on 323, "the price of accusatory speech is one Egger knows well but it is not a price that he can pass along to Phillips, to the defendant here" or, in that case.

So, what you have, the alleged retaliation, the defendant has come forward with admissible evidence disproving retaliation, and the plaintiff's only counter to that is his declaration that contains inadmissible hearsay and opinion testimony. And and again, referring to the Ritter Group, at 10253, "One the moving party has met the initial burden by this-- by its evidence, the burden shifts to the plaintiff to produce admissible evidence to controvert some material fact." So, anyway, I just I don't see it there. So I think the first cause of action has to fall.

The second cause of action, I really don't have much trouble. I

think Cole and Hart preempt that cause of action, so that one would fall. The third cause of action, unlawful retaliation by a public entity here is covered by Government Code section 10540, et sequitur, and that covers the same substance as the Labor Code does in 1102.5, and it applies specifically to public entities, so that requires an exhaustion of administrative remedies, which I'm satisfied was not done here. So that cause of action would fall. The fourth cause of action, there really was no opposition to that. The defendant's conduct is discretionary and that's protected under Government Code sections as applicable, 821.6, 820.2. and 815.2(b).The fifth cause of action. He did receive workers'

comp

benefits which are available really under retirement. So, I think I think he well, I don't think there's a triable issue as to whether or not he retired rather than resigned. In my view, I think the conclusion would be inescapable that he retired because that's the only way he can get the benefits. It's the only way that I'm aware of, anyway. And he did in fact receive those benefits. That is undisputed. It's the Cobb declaration talks about that.

Yeah. Yeah. Under the Cobb declaration the plaintiff retired under under disability retirement, and is and is eligible to return once the disability is overcome. So that that's not consistent with a

with a resignation. And, I know he's filed a declaration saying that he's resigned, but but so I would I would conclude that that he retired, as a matter of law, rather than resigned. Even if even if I should be wrong there, and I don't think I am, but even if I am, and there is a triable -- a factual issue as to whether he resigned or retired, I think he's still precluded because he failed to exhaust administrative remedies. He says he left because the working conditions were intolerable, because of the retaliation. And, again, going back to what I said before, I think retaliation requires filing with the State Personnel Board. So, that would fall.

And then, the sixth cause of action, of course, since the first cause of actions falls, that would

fall, too.

So, the net result of all this obviously is that summary judgment is granted. MR. GRAYBILL: Thank you. MR. SCALLY: Thank you.

THE COURT: Thank you, gentlemen. MR. DONAHUE: Your Honor, may I get some clarification on that? THE COURT: Sure.

MR. DONAHUE: You indicate that you found as a matter of law that this was not constitutionally protected speech. Is that correct?

THE COURT: Yes. MR. DONAHUE: So, this was done under --

THE COURT: Do you have any objection to my finding that as a matter of law? MR. GRAYBILL: No, your Honor. MR. DONAHUE: And and this was done under the Pickering analysis. Is that correct, your Honor? THE COURT: Yeah. Let let me state this. My opinions,

everything I've stated here is advisory, okay. And I'm and if I the findings that I am making are advisory findings, okay. Because in granting a motion for summary judgment, I can rely upon the entire state of the record, and that's what I'm doing. I'm going from the entire state of the record, and I don't have to give you any reason, technically. I'm doing this as a courtesy so that you have the benefit of my my thoughts. But, for the record, I am granting the motion for

summary judgment on the basis of the file in its entirety a presented to me. All of my comments that we've taken all this time on this morning are advisory and as a courtesy to you simply to advise you of of my thinking. Okay. But I'm not making formal findings, so -- okay. MR. GRAYBILL: Your Honor, I believe you also mentioned that there was no triable issue on the question of retaliation, as well. THE COURT: Right. MR. DONAHUE: I think that was based on the fact if it's not protected speech. THE COURT: Yeah, I I'm saying, if it's not protected MR. DONAHUE: Then there is THE COURT: then obviously, it's we don't go any further MR. DONAHUE: Correct. THE

COURT: But, even and that's why I said these comments are are advisory, and and only as a courtesy.

So, I'm saying, even if even if it is protected, I feel that there's still no triable issue raised because the the only admissible evidence before me is evidence in the form that there was no retaliation. That is, that he was passed over because somebody was better, and he didn't have as much experience, and so forth. And his own and which and that evidence coming forward has the effect of shifting the burden to the plaintiff for summary judgment purposes, and that burden was

not met because his declarations contained inadmissible testimony.

MR. DONAHUE: Thank you, your Honor.

MR. SCALLY: Thank you, your Honor.

MR. GRAYBILL: Thank you, your Honor.

THE COURT: Thank you, guys.

[Whereupon, hearing on this matter is concluded.]

©oOo©JAMES MAYLE,

Plaintiff,

) CASE NO.: 502775vsCALIFORNIA STATE LOTTERY COMMISSION, et al.,

Defendants.STATE OF CALIFORNIA COUNTY OF SACRAMENTO

I, Elaine Schmidt, a duly designated transcriber, do hereby declare and certify under penalty of perjury that I have transcribed the portion of tape which was duly recorded in the Superior Court of the State of California, County of Sacramento,

Department 2 on the 20th day of December, 90,in the above-captioned case and that the foregoing pages constitute a true, complete and accurate transcription of the aforementioned tape.Dated this 21st day of January, 1991

ELAINE SCHMIDT, Transcriber